RECORD AND BRIEFS

No. 16-307

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

MURPHY OIL USA, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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QUESTION PRESENTED

Whether employer-imposed arbitration agreements that bar individual employees from pursuing work-related claims on a collective basis in any forum violate 29 U.S.C. 158(a)(1) because they limit the employees' right under the National Labor Relations Act to engage in "concerted activities" for "mutual aid or protection," 29 U.S.C. 157, and are therefore unenforceable under the saving clause of the Federal Arbitration Act, 9 U.S.C. 2.

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INTRODUCTION

In 1935, Congress enacted the National Labor Relations Act (NLRA), 29 U.S.C. 151 *et seq.*, to minimize industrial strife by equalizing bargaining power between employees and their employers and protecting employees' "full freedom of association." 29 U.S.C. 151. The statute grants workers the right to stand together for "mutual aid or protection" in seeking to improve their lot as employees. 29 U.S.C. 157. Employer interference with that right is a prohibited unfair labor practice, 29 U.S.C. 158(a)(1), and Congress directed that such violations be remedied with cease-and-desist orders and appropriate affirmative relief, 29 U.S.C. 160(c).

Consistent with Congress' objectives, the right to engage in concerted activities for mutual aid or protection has long been understood to protect employees' efforts to persuade legislatures to enact, and administrative and judicial tribunals to enforce, laws that would improve their work lives. *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 565-566 (1978). In addition, employer efforts to stifle concerted activity by making contracts with individual employees that require them to resolve employment disputes solely on an individual basis have long been enjoined as an unfair labor practice. *Nat'l Licorice Co.* v. *NLRB*, 309 U.S. 350, 360-361 (1940).

In recent years, many employers have required employees to accept, as a condition of employment, arbitration agreements that mandate *individual* arbitration of all work-related legal claims, thereby prospectively waiving the employees' right to engage in collective legal action in any forum, either arbitral or

judicial. Employers have defended such agreements by invoking the Federal Arbitration Act (FAA), 9 U.S.C. 1 *et seq.*, which Congress enacted in 1925 to overcome judicial hostility to arbitration by placing arbitration agreements on an equal footing with other contracts, *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011). In that statute, Congress required that courts enforce arbitration agreements as written, subject to generally applicable contract defenses. 9 U.S.C. 2.

The National Labor Relations Board (Board) first reviewed the legality of such individual-arbitration agreements in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012), enforcement denied in relevant part, 737 F.3d 344 (5th Cir. 2013). It found that they interfere with employees' right to engage in concerted legal activity in violation of the NLRA, and are therefore exempt from the FAA's enforcement requirement. *Id.* at 2277, 2287. That holding is the origin of the Board rule now before this Court.

Contrary to the arguments of the Employers and their amici, this Court's FAA precedent does not dictate rejection of the Board's rule. None of this Court's prior FAA decisions compelling arbitration of statutory claims have enforced an agreement that violates an express prohibition in another federal statute. In urging the Court to do so for the first time here, the Employers would give their arbitration agreements a privileged status that violates the FAA's equal-footing principle. They would also use private contracts to eviscerate the public rights Congress protected in the NLRA. That is a result they could not achieve through any other contract, and should not be able to obtain in the guise of promoting arbitration.

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-10a.

STATEMENT

1. a. Murphy Oil USA, Inc. (respondent or Employer) operates more than 1000 gas stations in 21 States. Pet. App. 24a. It requires each of its employees and job applicants to sign, as a condition of employment, an agreement "to resolve any and all disputes or claims * * * which relate in any manner whatsoever [to the employee's or applicant's] employment * * * by binding arbitration." J.A. 8, Pet. App. 24a. The agreement also provides that the employees and applicants "waive their right to commence, be a party to, or [act as a] class member [in any case] or collective action in any court action," or "in arbitration or any other forum." *Ibid.* And they agree "that any claim * * * shall be heard without consolidation of such claim with any other person or entity's claim." J.A. 11.

In November 2008, Sheila Hobson signed respondent's arbitration agreement when she applied for employment. Pet. App. 2a, 26a. She was hired and remained employed until September 2010. *Id.* at 26a.

In June 2010, Hobson and three other employees collectively sued respondent in federal district court, alleging that they had not been paid for fuel surveys and other work, in violation of the Fair Labor Standards Act (FLSA), 29 U.S.C. 201 *et seq.* J.A. 14-26. Respondent, invoking its arbitration agreement, successfully moved to dismiss the case and compel individual arbitration of the employees' claims. Pet. App. 2a-4a.

b. Hobson filed an unfair-labor-practice charge with the Board in January 2011. Pet. App. 3a. The Board's Acting General Counsel issued a complaint alleging that respondent's maintenance of its agreement interfered with its employees' right under Section 157 of the NLRA to engage in concerted legal activities, thus violating Section 158(a)(1) of the NLRA, 29 U.S.C. 158(a)(1). *Ibid.*

c. In January 2012, while Hobson's NLRB case was pending, the Board issued its decision in *D.R. Horton, Inc.*, 357 N.L.R.B. 2277 (2012). The Board found that agreements with individual employees requiring individual arbitration of work-related disputes interfere with employees' Section 157 right to engage in concerted activities for mutual protection, in violation of Section 158(a)(1). *Id.* at 2278-2283. The Board recognized that the FAA "generally makes employment-related arbitration agreements judicially enforceable," *id.* at 2277, but found that when an agreement violates the NLRA, the FAA does not require its enforcement, *id.* at 2283-2288. The Board explained that this Court has long recognized that individual contracts that restrict rights under Section 157 violate Section 158, and that illegality under the NLRA is a defense to contract enforcement. *Id.* at 2280-2281, 2287 (discussing *Nat'l Licorice Co.* v. *NLRB*, 309 U.S. 350 (1940), *J.I. Case Co.* v. *NLRB*, 321 U.S. 332 (1944), and *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982)). Accordingly, to find individual-arbitration agreements illegal and therefore unenforceable does not treat them any "worse than any other private contract that conflicts with Federal labor law." *Id.* at 2285. And because such agreements "would equally violate the NLRA if [they] said nothing about arbitration," *ibid.*, an NLRA illegality defense does not run afoul of FAA precedent barring contract "defenses that apply only

to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue," *ibid.* (quoting *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011)).

The Fifth Circuit rejected the Board's analysis, holding that the NLRA does not "override" the FAA and that the "use of class action procedures * * * is not a substantive right" under Section 157. *D.R. Horton, Inc.* v. *NLRB*, 737 F.3d 344, 357, 360-362 (5th Cir. 2013). The court recognized that prior Board and court decisions "give some support to the Board's analysis that collective and class claims * * * are protected by Section [157]." *Id.* at 357. Nevertheless, it found that under *Concepcion*, the Board's rule did not fit within the FAA's saving clause, 9 U.S.C. 2, which preserves general contract defenses. *Concepcion*, 563 U.S. at 359. The court reasoned that employees' ability to "seek class relief in court" would discourage employers "from using individual arbitration." *Horton*, 737 F.3d at 357. It further determined that the NLRA does not "contain[] a congressional command to override the FAA." *Id.* at 360-361. Finally, it explained that "a substantive right to proceed collectively has been foreclosed by prior decisions," *id.* at 361 (citing *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 32 (1991); *Carter* v. *Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004)), so "[t]he end result is that the Board's decision creates either a right that is hollow or one premised on an already-rejected justification," *ibid.* Judge Graves dissented in relevant part, agreeing with the Board's rationale. *Id.* at 364-365.

d. In October 2014, the Board issued its decision against respondent. Pet. App. 17a-89a. Notwithstanding the Fifth Circuit's intervening decision, the Board reaffirmed its *Horton* rationale that agreements

requiring individual arbitration of work-related claims violate Section 158(a)(1), noting that "no decision of the Supreme Court speaks directly to the issue." *Id.* at 22a-23a, 43a. The Board also reaffirmed its holding that the FAA does not require enforcement of such an agreement, because that statute's saving clause preserves established contract defenses such as illegality. *Id.* at 44a. Accordingly, the Board found that respondent committed an unfair labor practice by maintaining an agreement "requiring its employees to agree to resolve all employment-related claims through individual arbitration." *Id.* at 23a. Two members of the Board dissented in relevant part. *Id.* at 89a-131a, 131a-208a.

2. Respondent filed a petition for review in the Fifth Circuit. 29 U.S.C. 160(f). The court, adhering to its precedent in *Horton*, granted respondent's petition, holding that its agreement is enforceable to the extent that it requires employees to pursue all employment-related claims through individual arbitration. Pet. App. 2a, 8a.[1]

3. The Board filed a petition for rehearing en banc, which was denied on May 13, 2016. Pet. App. 213a-214a.

SUMMARY OF ARGUMENT

I.A. Section 157 of the NLRA grants employees the right to engage in "concerted activities for the purpose

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[1] The court reversed the Board's additional finding that respondent had violated Section 158(a)(1) by seeking to compel arbitration of Hobson's FLSA claim. Pet. App. 12a-16a. The court agreed with the Board's separate finding that the agreement is unenforceable to the extent that it could reasonably be construed as prohibiting employees from filing unfair-labor-practice charges with the Board. *Id.* at 10a-11a.

of * * * mutual aid or protection." 29 U.S.C. 157. That protection serves the congressional purpose of affording employees "full freedom of association." 29 U.S.C. 151. Section 157 thus broadly safeguards concerted activity that furthers employees' interests, whether those employees are in a union or not. See *NLRB* v. *Wash. Aluminum Co.*, 370 U.S. 9, 14-15 (1962). From the earliest days of the NLRA, Section 157's protection has encompassed employees' collective litigation of legal claims. This Court endorsed that construction in *Eastex, Inc.* v. *NLRB*, which flatly rejected the argument that "employees lose their protection * * * when they seek to improve * * * their lot as employees through channels outside the immediate employee-employer relationship." 437 U.S. 556, 565 (1978).

The Employers, recently joined by the Acting Solicitor General, insist on a narrow construction of Section 157 inconsistent with this Court's NLRA precedent. They mischaracterize the right to engage in concerted activities for mutual protection as "peripheral" or "residual," reading it as limited by other, more specific Section 157 rights. But this Court has rejected a similar argument as "misconceiv[ing] the reach of the 'mutual aid or protection' clause." *Eastex*, 437 U.S. at 564.

B. In Section 158(a)(1), Congress made it an unfair labor practice for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 157." 29 U.S.C. 158(a)(1). The Board determined early on that an employer violates that prohibition by making employees promise to forego the collective rights Congress afforded them. This Court agreed in *National Licorice*, reasoning that "employers cannot set at naught the [NLRA] by

inducing their workmen to agree not to demand performance of the duties which it imposes." 309 U.S. at 364; *id.* at 360-364.

That interpretation of Section 158 as barring individual prospective waivers of Section 157 rights effectuates the NLRA's policies. Prospective waivers of Section 157 rights deprive employees of the opportunity to decide, when a dispute arises, whether to proceed alone or to initiate or join a concerted response. Individual waivers are inconsistent with the collective nature of Section 157 rights and diminish those collective rights by permanently removing employees one by one from the group available to engage in concerted activities.

The Acting Solicitor General asserts that it is anomalous that NLRA-protected employees have an unwaivable Section 157 right to use the FLSA's collective procedures, whereas other employees do not. But those differing results follow from the fact that the NLRA and FLSA provide distinct rights and serve different purposes. As a result, an NLRA-protected worker has rights under the NLRA that a worker who is not an "employee" under the NLRA does not have.

C. Congress empowered the Board to prevent violations of the NLRA, and required that it issue cease-and-desist orders to remedy them. 29 U.S.C. 160(a) and (c). Moreover, barring enforcement of contracts that violate the NLRA gives effect to the general principle that "a federal court has a duty to determine whether a contract violates federal law before enforcing it." *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72, 83 (1982).

II.A. Congress enacted the FAA in response to judicial hostility to arbitration, including courts' practice of allowing parties to unilaterally revoke promises

to arbitrate. The statute established a federal policy favoring arbitration by requiring courts to place arbitration agreements "upon the same footing as other contracts." H.R. Rep. No. 96, 68th Cong., 1st Sess. 1 (1924). To that end, Section 2 of the FAA provides for the enforcement of arbitration agreements "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2.

This Court has never enforced an arbitration agreement that violates another federal statute, as the agreements here violate the NLRA by imposing prospective waivers of concerted activities. In such a case, there is no need to reconcile the FAA and the other federal statute—under the congressional-command test or any other analytical framework—because the illegal agreement is not a valid contract entitled to enforcement under Section 2 of the FAA. Both statutes can be fully effectuated. See *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974) (when feasible, courts considering two congressional enactments must "regard each as effective").

B. Section 2's saving clause preserves the Board's rule invalidating agreements that require employees to individually arbitrate work-related claims. That rule is not based on hostility towards arbitration, which the Board recognizes as an effective forum for vindicating federal laws. It is based on longstanding labor-law principles developed without reference to arbitration, which implement the NLRA's express bar on employer interference with employees' right to act together for mutual protection. The rule is entirely neutral with respect to the forum. An employer may, consistent with the NLRA, insist that employees pursue *all* work-related disputes in arbitration; what it may not do is bar employees from pursuing their

legal claims *collectively* in any forum, arbitral or judicial.

Because agreements that preclude collective pursuit of legal claims in any forum violate the NLRA, they are unenforceable under general contract law. That illegality defense fits within the saving clause because it neither facially discriminates against arbitration nor "derive[s] [its] meaning from the fact that an agreement to arbitrate is at issue." *Concepcion*, 563 U.S. at 339.

The Employers misread this Court's saving-clause analysis in *Concepcion*. The contract defense asserted in *Concepcion* was materially distinguishable from the Board's rule in both provenance and effect. Significantly, neither *Concepcion* nor any of this Court's FAA cases hold that the FAA requires enforcement of an arbitration agreement that, like the Employers' agreements, directly violates an explicit proscription in a coequal federal statute. Furthermore, the unqualified language of the saving clause lends little support to the Employers' remaining efforts to limit its application to less than the full panoply of contract defenses. And the Employers' position fails to effectuate Congress' purpose, in enacting the FAA, of requiring courts to enforce arbitration agreements only to the same extent as they would enforce any other contract.

C. Contrary to the Employers' arguments, the FAA congressional-command test is inapplicable. In the absence of a valid contract to arbitrate, there is no need to consider whether Congress has expressly overridden enforcement of agreements to arbitrate certain types of statutory claims. See *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987). Moreover, that test was developed to address challenges to arbitration of federal statutory claims based on asserted

statutory entitlements to a judicial forum or purported inadequacies inherent to arbitration. The Board's rule does not rely on either rationale.

D. Finally, regardless of the analytical framework, the Employers' position that the FAA mandates enforcement of arbitration agreements that violate the NLRA distorts the FAA's purpose. It would transform the FAA's recognition of arbitration agreements as presumptively legitimate contracts into a license to evade another federal statute. Arbitration agreements that facially discriminate against persons over 40 cannot be enforced without making courts a party to discrimination. Similarly, here, enforcement of an arbitration agreement that requires employees to resolve their disputes with employers solely on an individual basis makes the enforcing court a party to illegal interference with the established right of employees to seek vindication of their employment rights through concerted activity.

ARGUMENT

I. ARBITRATION AGREEMENTS THAT BAR EMPLOYEES FROM CONCERTEDLY PURSUING WORK-RELATED LEGAL CLAIMS ARE ILLEGAL UNDER THE NLRA

A. Section 157 of the NLRA Guarantees Statutory Employees the Right To Act Concertedly for "Mutual Aid or Protection" by Pursuing Work-Related Claims Using Generally Available Collective-Litigation Procedures

Congress enacted the NLRA to protect employees' "full freedom of association" to join together to advance their interests as employees. 29 U.S.C. 151. To that end, Section 157 implements the core objectives of the

NLRA by guaranteeing that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as "to refrain from any or all of such activities." 29 U.S.C. 157. Congress thus explicitly created a distinct right to engage in "concerted activities for * * * mutual aid or protection." *Ibid.*

1. This Court's decisions have long recognized that the right to act concertedly for mutual aid or protection broadly protects workers seeking to improve their lot as employees. In *NLRB* v. *Washington Aluminum Co.*, for example, the Court upheld the right of unorganized workers to walk off the job without prior notice in response to the extreme cold of their workplace. 370 U.S. 9, 14-15 (1962). The Court rejected the employer's arguments that the employees were required first to raise the issue with their employer, conform to a plant rule requiring permission to leave work, or otherwise choose a more "reasonable" response before engaging in a spontaneous work stoppage. *Id.* at 14-17. Burdening employees' Section 157 rights with such requirements, the Court found, would "effectively nullify" those rights and "frustrate the policy of the [NLRA]." *Id.* at 14. It emphasized that employees' need for flexibility in concertedly seeking improvements to working conditions is even greater when they are not formally represented by a union. *Ibid.* By contrast, the Court explained that only limited categories of concerted activities, such as unlawful, violent, or indefensibly disloyal conduct, fall outside of Section 157's expansive protection. *Id.* at 17.

Subsequently, in *Eastex*, the Court closely examined the "mutual aid or protection" clause of Section 157. The Court reaffirmed that the clause expanded Section 157's protections well beyond organization and bargaining, and beyond an employee's own workplace or employment relationship, *Eastex*, 437 U.S. at 564-565, to cover matters relating to employees' "interests as employees," *id.* at 566. At issue was whether Section 157 protected employees' distribution of a union newsletter containing articles that encouraged employees to contact legislators to oppose incorporating the state's "right-to-work" statute into the state constitution, and to advocate for a higher federal minimum wage. *Id.* at 559-560, 563. In defending its refusal to allow distribution of the newsletter, the employer did not dispute that the activity was "concerted," but argued that the articles did not constitute "mutual aid or protection" because they were unrelated to a specific dispute "over an issue which the employer has the right or power to affect." *Id.* at 563. The employer further asserted "that employees lose their protection under the 'mutual aid or protection' clause when they seek to improve * * * their lot as employees through channels outside the immediate employee-employer relationship." *Id.* at 565 (quoting 29 U.S.C. 157).

The Court held that the distribution of the newsletter was protected. *Eastex*, 437 U.S. at 563-570. It determined that Section 157 reflects Congress' understanding "that labor's cause often is advanced on fronts other than collective bargaining and grievance settlement within the immediate employment context." *Id.* at 565. Congress chose, the Court explained, "to protect concerted activities for the somewhat *broader* purpose of 'mutual aid or protection' as well as for the *narrower* purposes of 'self-organization' and 'collective bargaining.'" *Ibid.* (emphasis added) (quoting 29 U.S.C. 157); see

also *id.* at 565 n.14 (citing congressional recognition of employees' right to act concertedly regarding "*the welfare of labor generally*") (quoting S. Rep. No. 163, 72d Cong., 1st Sess. 9 (1932)). The Court illustrated the diversity of activities for mutual aid or protection by citing with approval cases protecting appeals to legislators and efforts "to improve working conditions through resort to administrative and judicial forums." *Id.* at 565-566 & nn.15-16.[2]

2. As this Court explained in *Eastex*, employees have long turned to courts as one avenue for collectively protecting their mutual interests. Congress has enacted a number of individual-rights statutes since the passage of the NLRA, setting baseline standards for terms such as wages and hours, and conditions like non-discrimination. See, *e.g.*, FLSA, 29 U.S.C. 206 (minimum wage) and 207 (maximum hours); Age Discrimination in Employment Act (ADEA), 29 U.S.C. 621, 623. As the Board observed, "these statutes provide additional legal rights and remedies in the workplace, but in no way supplant, or serve as a substitute for, workers' basic right under Section [157] to engage

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[2] The Acting Solicitor General (pp. 23-24) and other amici (*e.g.*, Wash. Legal Found. 23-24) point out that those cases involve retaliation. That does not affect the Court's holding as to the breadth of Section 157's protection. Such protection is a prerequisite to finding any type of unlawful interference, including retaliation. See *infra*, Part I.B. Moreover, *Eastex* itself was not a retaliation case. 437 U.S. at 559-561. The Employers (Murphy/Epic 36-37; E&Y 44) and Acting Solicitor General (p. 24 n.3) also emphasize that *Eastex* did not address the matter of when legal activity for mutual protection is "concerted" within the meaning of Section 157. *Id.* at 566 n.15. That is unremarkable given that the only issue before the Court was whether the concededly concerted distribution of the newsletter met the mutual-protection requirement of Section 157.

in concerted activity as a means to secure whatever workplace rights the law provides them." Pet. App. 42a.

Following the FLSA's enactment in 1938, the Board and courts made clear that employees act concertedly for mutual protection when they join together to enforce their rights under employment-related statutes. In *Spandsco Oil & Royalty Co.*, the Board found that three employees engaged in Section 157-protected activity when they filed an FLSA suit for overtime wages against their employer, 42 N.L.R.B. 942, 948-950 (1942), because the suit "bore directly on their wages and working conditions," *id.* at 949. Likewise, in *NLRB* v. *Moss Planing Mill Co.*, the Fourth Circuit agreed with the Board that a concerted wage claim was protected, explaining that "the protection of the [NLRA] must certainly be extended to concerted activities * * * to secure payment of wages guaranteed by the law of the land." 206 F.2d 557, 560 (1953). To the present day, the Board and the courts have continued to find concerted legal activity aimed at enforcing non-NLRA employment statutes protected. See, *e.g.*, *Eastex*, 437 U.S. at 566 n.15 (collecting cases); see also *Harco Trucking, LLC*, 344 N.L.R.B. 478, 478-479 (2005) (wage-related class action); *United Parcel Serv., Inc.*, 252 N.L.R.B. 1015, 1018, 1022 & n.26 (1980) (same), enforced, 677 F.2d 421 (6th Cir. 1982). Congress has never acted to curtail that interpretation, despite its extensive amendments to the NLRA in 1947 and 1959.

3. Protecting concerted legal activity also advances the NLRA's core objectives. First, it serves to "restor[e] equality of bargaining power between employers and employees." 29 U.S.C. 151; Pet. App. 60a. As this Court has acknowledged, statutory employment

standards such as the minimum wage have a "widely recognized impact" on the terms unions may successfully negotiate. *Eastex*, 437 U.S. at 570; see also *Metro. Life Ins. Co.* v. *Mass.*, 471 U.S. 724, 754 (1985) (noting Congress intended NLRA to remedy "widening gap between wages and profits" (quoting 79 Cong. Rec. 2371 (1935)). And collective litigation, or the potential for such litigation, "is often an effective weapon for obtaining [benefits] to which [employees] * * * are already 'legally' entitled." *Salt River Valley Water Users' Ass'n* v. *NLRB*, 206 F.2d 325, 328 (9th Cir. 1953) (protecting circulation of petition authorizing employee to represent coworkers in FLSA lawsuit). Concerted enforcement of those standards thus advances both organized employees' efforts to negotiate better terms and individual employees' efforts to receive statutorily guaranteed ones.

Second, protecting legal activity furthers the congressional goal of minimizing "industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes." 29 U.S.C. 151; Pet. App. 32a. To promote that goal, Section 157 ensures that employees may choose to engage with one another in the manner they believe will best protect their interests. See *Wash. Aluminum*, 370 U.S. at 16. The availability of collective legal action as one option may at times channel concerted efforts away from more disruptive protests, like organized strikes or spontaneous work stoppages. By contrast, interpreting Section 157 to protect employees who engage in a work stoppage to protest being underpaid, but not to protect those same employees if they instead bring a concerted FLSA lawsuit, undermines the goal of minimizing economic disruptions.

4. The Employers and their amici offer a series of arguments aimed at reducing the scope of employees' longstanding right to act together to utilize available laws and procedures to strengthen their hand in resolving work-related grievances. Each misses the mark.

a. Ernst & Young and the Acting Solicitor General mischaracterize Section 157's crucial right to engage in "other concerted activities" for mutual protection as a "residual" or "catch-all" phrase, to be relegated to second-tier status. E&Y 14, 17, 27-28, 42-43; OSG 11, 20, 23, 25, 27. They rely on two related statutory canons of construction, *ejusdem generis* and *noscitur a sociis*, to argue that "other concerted activities" must be given a restricted reading based on the more specific Section 157 rights "to self-organization, to form, join, or assist labor organizations, and to bargain collectively." Murphy/Epic 33-34; E&Y 27-28, 42-43; OSG 23. They cite no authority for applying those canons to Section 157, and the Court has historically declined to do so. In *Eastex*, the Court rejected the employer's strikingly similar argument "that the term 'collective bargaining' in [Section 157] indicates a direct bargaining relationship whereas 'other mutual aid or protection' must refer to activities of a similar nature." 437 U.S. at 564 (quoting 29 U.S.C. 157) (other internal quotation marks omitted). As the Court explained, that argument "misconceives the reach of the 'mutual aid or protection' clause." *Ibid.* The language of the clause "makes clear" that Congress intended to *broaden* Section 157's scope beyond organization and bargaining. *Id.* at 565. Moreover, "[n]oscitur a sociis and ejusdem generis, like the other [textual] canons, are just aids to meaning, not ironclad rules. Thus, they have no value if the statute evidences a meaning contrary to their presumptions." William N.

Eskridge, Jr. & Philip P. Frickey, *Cases and Materials On Legislation: Statutes and the Creation of Public Policy* 638 (2d ed. 1995); see also *Garcia* v. *United States*, 469 U.S. 70, 74-75 (1984) ("[T]he rule of *ejusdem generis*, while firmly established, is only an instrumentality for ascertaining the correct meaning of words when there is uncertainty.") (internal quotation marks omitted).[3]

b. Contrary to the claims of the Employers (Murphy/Epic 32; E&Y 31), the fact that the NLRA predates FLSA Section 216(b) and Federal Rule of Civil Procedure 23 does not preclude the NLRA from protecting employees' concerted use of such procedures. As the Seventh Circuit explained, "Congress was aware of class, representative, and collective legal proceedings when it enacted the NLRA," because other collective procedures, from permissive joinder to representative suits, long predate the NLRA. *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147, 1154 (2016) (relying on 7 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1651 (3d ed. 2015) (additional citations omitted)).

Moreover, this Court has recognized that the NLRA was drafted broadly to enable the Board to respond to new developments impacting employees. See *NLRB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 265-266 (1975). Section 216(b) and Rule 23 are tools that post-date the NLRA—like Facebook and email—that employees

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[3] The inability of the Employers (Murphy/Epic 34) and amici (*e.g.*, OSG 20) to agree on a unifying characteristic among Section 157 rights confirms that the canons are unhelpful here. See *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 225 (2008) (inability to identify "common attribute [that] connects the specific items" in statute rendered canons of construction inapplicable).

may use in asserting their long-held right to act collectively and induce others to join them.

c. The Employers (Murphy/Epic 48-49) misconstrue the Board's rule by insisting it would preclude employers from challenging Rule 23 motions, and judges from denying Rule 23 certification, based on a putative class' failure to meet the rule's general requirements (or to comply with rules governing FLSA collective proceedings). But the Board could not have been clearer: "the NLRA does not create a right to class certification or the equivalent." Pet. App. 20a. Rather, it "create[s] a right to *pursue* joint, class, or collective claims *if and as available*, without the interference of an employer-imposed restraint." *Ibid.* (second emphasis added).

The Board's finding that Section 157 protects employees' right to use available procedural tools thus does not, contrary to the claims of the Employers (Murphy/Epic 48-49) and their amici (*e.g.*, Wash. Legal Found. 28-29), either "enlarge" or "abridge" substantive rights in violation of the Rules Enabling Act, 28 U.S.C. 2072. The employees' substantive Section 157 right is to pursue their claims together; the existence of a new procedure does not expand that right. Employees who select modern procedures to collectively advance their claims do so subject to the constraints (*e.g.*, numerosity or typicality under Rule 23) inherent to those procedures, which do not restrict the employees' Section 157 rights.

d. Finally, Ernst & Young (pp. 41-42) argues that representative procedures such as Rule 23 class actions, or some subset of cases invoking them, are not "concerted." Its argument is incorrect but largely irrelevant. The precise NLRA violation before the Court in *Murphy Oil* does not involve application of

an agreement to bar any particular lawsuit, but *maintenance* of an agreement that flatly prohibits concerted legal activity of any kind. Moreover, in each of the cases before the Court, more than one employee participated in the lawsuit, satisfying the most basic and uncontroversial definition of concert.[4] In any event, a single employee engages in concerted activity within the meaning of Section 157 by filing a class or collective action on behalf of similarly situated employees. *Horton*, 357 N.L.R.B. at 2279. Under settled Board law, which is unchallenged here, the employee-plaintiff in such cases acts concertedly by invoking established procedures with the intent "to initiate or to induce or to prepare for group action." *Meyers Indus., Inc.*, 281 N.L.R.B 882, 887 (1986), affirmed sub nom. *Prill* v. *NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).[5]

Concertedness depends on an intent to induce participation, not the method of achieving it. That the solicitation to join in concerted activity may be conveyed to other employees through formal court-notification procedures rather than some other form of communication does not prevent the activity from being concerted. See, *e.g.*, *Morton Int'l, Inc.*, 315 N.L.R.B. 564, 566 (1994) (employee who wrote critical

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[4] Jacob Lewis filed his lawsuit against Epic alone, but other employees joined the case as plaintiffs. See, *e.g.*, Notice of Consent to Join Lawsuit, No. 15-00082 (W.D. Wis. Mar. 31, 2015), ECF No. 14.

[5] That key element of inducement distinguishes the Board's rationale from the "constructive concerted activity" theory announced in *Alleluia Cushion Co.*, 221 N.L.R.B. 999, 1000-1001 (1975), overruled in *Meyers Indus., Inc.*, 268 N.L.R.B. 493, 495-496 (1984). That rejected theory presumed activity undertaken solely for individual benefit was concerted if it would benefit other employees.

comments on posting in workplace was acting concertedly because he intended to induce others to join his critique); see generally *NLRB* v. *City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984) ("There is no indication that Congress intended to limit [Section 157's] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way."). Likewise, ultimate denial of collective proceedings does not mean the employee-plaintiff's prior efforts were not concerted. See, *e.g.*, *Circle K Corp.*, 305 N.L.R.B. 932, 933-934 (1991) (unsuccessful attempts to persuade coworkers to sign petition were concerted), enforced, 989 F.2d 498 (6th Cir. 1993) (per curiam).

The same reasoning undermines the Employers' contention that filing a lawsuit is not concerted activity because it supposedly "burden[s] parties extrinsic to the employer-employee relationship," obligating judges or arbitrators to certify a class or approve concerted litigation in order for the employees to act concertedly. Murphy/Epic 34-36; E&Y 41-42. As the Board explained, the protected activity at issue is the employees' concerted use of the procedures and laws that legislators have afforded them as a means of improving their lot as employees. Pet. App. 20a. Just as the employees' joint appeals to a legislature remain concerted whether or not their petition is successful, litigation retains its concerted character whether a court ultimately grants or denies the request for joinder or class certification.

B. Section 158(a)(1) of the NLRA Proscribes Individual Contracts That Prospectively Waive Employees' Section 157 Rights

In enacting the NLRA, Congress affirmatively protected statutory employees' right to engage in concerted protected activities. Section 158(a)(1) makes it unlawful for employers to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 157." 29 U.S.C. 158(a)(1). The unqualified language of Section 158(a)(1), the history of the NLRA, and this Court's jurisprudence make clear that conditioning employment on an employee's waiver of her right to engage in Section 157 activities, including collective litigation, is unlawful.

1. Federal labor law developed largely in reaction to employers' use of contract to impede employees' efforts to band together in advancing their interests as employees. In the decades preceding the NLRA's enactment, "the federal courts generally were regarded as allies of management in its attempt to prevent the organization and strengthening of labor unions; and in this industrial struggle the injunction became a potent weapon that was wielded against the activities of labor groups." *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250 (1970). Courts routinely enforced employee promises not to join a union—denounced as "yellow dog" contracts—or to become connected with a union, as was the case in *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229, 250-252, 260 (1917). In 1932, near-universal recognition of the abuses wrought by the enforcement of such contracts led Congress to enact the Norris-LaGuardia Act, 29 U.S.C. 101 *et seq.*, to restrict federal courts' jurisdiction to grant labor injunctions. S. Rep. No. 163, 3, 7-8. Congress enacted

the NLRA three years later, expanding federal labor protections to make all manner of employer interference with employees' concerted activities for mutual protection unlawful, 29 U.S.C. 158(a)(1), and enjoinable by the courts of appeals, 29 U.S.C. 160.

Against that backdrop, it was self-evident to the Board and courts that employers violated the NLRA by insisting that individual employees promise to forego the collective rights that Congress had afforded them. See, *e.g.*, *Carliste Lumber Co.*, 2 N.L.R.B. 248, 266 (1936) (unlawful "yellow-dog" contract predicated employment on renouncing union membership), enforced, 94 F.2d 138 (9th Cir. 1937); *Vincennes Steel Corp.*, 17 N.L.R.B. 825, 831-833 (1939) (employer unlawfully induced employees to subscribe to stock-purchase plan that barred wage-raise requests), enforced, 117 F.2d 169, 172-173 (7th Cir. 1941). The Board also condemned employers' widespread use of individual agreements that provided that an employer would not sign a union agreement or maintain a closed shop. See generally *Nat'l Licorice Co.* v. *NLRB*, 309 U.S. 350, 354 n.1 (1940) (citing cases).

This Court endorsed the Board's statutory interpretation in *National Licorice*, which held that an employer violated Section 158(a)(1) of the NLRA by requiring each of its employees to sign individual contracts prospectively restricting their Section 157 rights. 309 U.S. at 360-364. It found that the contracts were unlawful because they had been procured through the mediation of a company-dominated employee committee as a means of eliminating the union seeking to represent the employers' employees. *Id.* at 359-360. It separately found that the contracts, "by their terms," substantively curtailed employees'

Section 157 rights by prohibiting employees from presenting grievances to the employer "through a labor organization or [their] chosen representatives, *or in any way except personally*," and from obtaining a signed agreement "by [the] employer with any Union." *Id.* at 360 (emphasis added). Because the contracts thus "stipulated for the renunciation by the employees of rights guaranteed by the [NLRA], and were a continuing means of thwarting the policy of the [NLRA]," the Court found them unenforceable. *Ibid.*

In *J.I. Case Co.* v. *NLRB*, the Court reaffirmed that employers cannot utilize individual contracts to circumscribe their NLRA obligations. 321 U.S. 332, 337-338 (1944). The employer offered each of its employees a contract setting employment terms; the contracts were not a condition of employment or the product of coercion. *Id.* at 333. When a union subsequently petitioned to represent the employees, the employer argued that the individual contracts precluded representation and, when unsuccessful, refused to bargain with the duly certified union respecting matters covered by the contracts while they remained in effect. *Id.* at 333-334. The Court held that the employer's refusal violated the NLRA. As the Court explained, "[t]he Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices." *Id.* at 337 (quoting *Nat'l Licorice*, 309 U.S. at 364). Accordingly, "[w]herever private contracts conflict with its functions, they obviously must yield or the [NLRA] would be reduced to a futility." *Id.* at 337.

Since then, the Board, with court approval, has rejected *prospective* individual waivers of Section 157 rights. It has found that an employer cannot lawfully condition reinstatement on a discharged employee's

waiver of the right to engage in future protected concerted activity. See, *e.g.*, *Bon Harbor Nursing & Rehab. Ctr.*, 348 N.L.R.B. 1062, 1078 (2006). It has also rejected separation agreements that condition severance pay on the departing employee's agreement not to help other employees in future disputes, *Ishikawa Gasket Am., Inc.*, 337 N.L.R.B. 175, 175-176 (2001), enforced, 354 F.3d 534 (6th Cir. 2004), and agreements stripping employees of the right to organize, *First Legal Support Servs., LLC*, 342 N.L.R.B. 350, 362-363 (2004).

The Employers (Murphy/Epic 46-47) and the Acting Solicitor General (OSG 27-29) argue that neither *National Licorice* nor *J.I. Case* supports the proposition that the NLRA prohibits individual contracts that prospectively waive Section 157 rights. In their view, those cases held only that employers cannot use contracts to "eliminate the Union as the collective bargaining agency of [the] employees," *Nat'l Licorice*, 309 U.S. at 360, or "to forestall bargaining or to limit or condition the terms of the collective agreement," *J.I. Case*, 321 U.S. at 337. Factually, that argument disregards *National Licorice*'s express recognition that the effect of the unlawful contracts in that case was to preclude employees from dealing with their employer "in any way except personally." 309 U.S. at 360. Moreover, by attempting to distinguish the cases on the basis of the specific Section 157 right at issue, the Employers simply renew their untenable effort to narrow Section 157.

National Licorice and *J.I. Case* do not purport to limit the scope of Section 157. And their holdings—that Section 158(a)(1) bars employers from using individual contracts with their employees to "set at naught

the [NLRA]," *Nat'l Licorice*, 309 U.S. at 364—are directly applicable here. The need to enjoin the use of individual agreements that prospectively obstruct protected concerted employee activity is as great today as it was prior to the passage of the Norris-LaGuardia Act. Decreasing union density has made the concerted efforts of unorganized employees to enforce minimum statutory standards more central to protecting and improving their work lives. Meanwhile, employers' burgeoning use of individual-arbitration agreements threatens to foreclose such concerted legal activity, just as employers' use of individual employment contracts, decades ago, impaired employees' attempts at self-organization until the NLRA made those contracts unlawful.

2. Ignoring *National Licorice*, and the established proposition that Section 158(a)(1) bars individual agreements that prospectively waive employees' Section 157 rights, Ernst & Young and several amici (*e.g.*, Wash. Legal Found. 26-27; Emp'rs Grp. 10) insist that parties "have a presumptive right to waive legal protections intended for their benefit." E&Y 46. But their reliance on that principle overlooks that the waivers here are prospective, and that the rights waived are both collective and public.

a. The cases cited (E&Y 46-47) for the proposition that rights are presumptively waivable share a common characteristic: they do not involve *prospective* waivers of the rights at issue.[6] In *United States* v.

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[6] The one exception is the Seventh Amendment right to a jury trial in civil proceedings, which courts generally agree may be knowingly and intentionally waived in advance of a concrete dispute. See, *e.g.*, *Leasing Serv. Corp.* v. *Crane*, 804 F.2d 828, 832-833 (4th Cir. 1986); *K.M.C. Co.* v. *Irving Trust Co.*, 757 F.2d

Mezzanatto, for instance, the Court upheld the admission at trial of statements a defendant had made during earlier, unsuccessful plea discussions. 513 U.S. 196, 198-201, 210-211 (1995). The Court found that the defendant had waived any right to keep the discussions confidential. *Id.* at 210-211. That waiver was post-dispute: it applied only to proceedings regarding the charges under discussion when he agreed to waive. The waivers of concerted activity in arbitration agreements, by contrast, bind employees irrevocably from the day they are signed, with respect to events that have yet to occur and disputes that have yet to arise.

Section 157 grants employees both the right to engage in and refrain from concerted activities. Contrary to the Employers' arguments (Murphy/Epic 45; E&Y 46), both aspects of the provision support the proposition that individuals cannot prospectively waive the rights it creates.[7] Concerted activity—particularly involving unorganized workers—often arises when employees are presented with actual problems and have to decide among themselves how to respond. See, *e.g.*, *Trompler, Inc.*, 335 N.L.R.B. 478, 479-481 (2001) (employee

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752, 755 (6th Cir. 1985). That is because the Seventh Amendment "preserved" the existing right to a jury, which "was never intended to establish the jury as the exclusive mechanism for factfinding in civil cases." *Atlas Roofing Co.* v. *Occupational Safety & Health Review Comm'n*, 430 U.S. 442, 459, 460 (1977).

[7] The Employers also cite a prosecutorial memorandum by the Board's General Counsel arguing that employees may have a protected right to file a collective lawsuit yet be subject to an arbitration agreement's concerted-action waiver. Murphy/Epic 37 (citing Memorandum GC 10-06 (June 16, 2010)); E&Y 44-45 (same). That amounts to an argument that the Section 157 right is waivable, and fails for the same reasons. See also *Horton*, 357 N.L.R.B. at 2282-2283 (rejecting GC Memorandum's rationale).

walkout to protest supervisor's failure to prevent sexual harassment of one employee by another), enforced, 338 F.3d 747 (7th Cir. 2003); *Tamara Foods, Inc.*, 258 N.L.R.B. 1307, 1307 (1981) (employee walkout due to exposure to ammonia in work area), enforced, 692 F.2d 1171, 1180 (8th Cir. 1982). The meaningful preservation of Section 157's protections necessarily entails that employees retain the ability to decide, as events unfold and employees confer, whether or not to band together with their coworkers.

In *Washington Aluminum*, the Court affirmed the crucial importance of employees' ability to join together in spontaneous reaction to events that affect them. 370 U.S. at 11-16. It has since held that employees must retain that ability on an ongoing basis. Thus, the Court has found that a union violates the NLRA's prohibition on *union* restraint of the Section 157 "right to refrain" by enforcing individual employee promises to honor a strike for its duration. Specifically, in *NLRB* v. *Granite State Joint Board, Textile Workers Local 1029*, the Court concluded that where "there are no restraints on the resignation of members [from their union], * * * the vitality of [Section 157] requires that the member be free to refrain in November from the actions he endorsed in May." 409 U.S. 213, 217-218 (1972). Subsequently, in *Pattern Makers' League of North America* v. *NLRB*, the Court deferred to the Board's view that a union rule restricting an employees' right to resign from membership during a strike unlawfully "restrains or coerces" employees in the exercise of their Section 157 rights. 473 U.S. 95, 114 (1985).

Prospective individual waivers, like those in the Employers' agreements, therefore impair an employee's "full freedom" to decide at the appropriate time

whether or not to participate in concerted activity. 29 U.S.C. 151. Under the Board's rule, by contrast, employees retain both their right to engage in, and their right to refrain from, concerted pursuit of their work-related claims. See Pet. App. 74a ("In prohibiting *employers* from requiring employees to pursue their workplace claims individually, *D.R. Horton* does not compel *employees* to pursue their claims concertedly.").

b. As described, Section 157 confers a *collective* right on employees. While an employee has the right to decide, in any given instance, to refrain and pursue her claims individually, employees bound by irrevocable waivers can never join in collective proceedings, arbitral or judicial, regardless of the force of coworkers' appeals. Those waivers thus remove employees, one by one, from the group available to join in the concerted lawsuit or arbitration. Accordingly, each employee's individual waiver of such rights diminishes the value of Section 157 for all employees.

The mechanics and the effects of such unlawful, individual waivers contrast meaningfully with those of waivers negotiated by unions on behalf of represented employees, which are lawful if clear and unmistakable. Individual employee waivers have long been used by employers to isolate employees and deny them the right to act in concert. By contrast, *collective* waivers "stem[] from an *exercise* of Section [157] rights: the collective-bargaining process," *Horton*, 357 N.L.R.B. at 2286, and are therefore permissible unless they interfere with employees' selection of a bargaining representative. See *Metro. Edison Co.* v. *NLRB*, 460 U.S. 693, 705-707 (1983). A union, serving as the exclusive representative of employees under Section 159(a) of the NLRA, 29 U.S.C. 159(a), "enjoys broad authority"

to negotiate agreements that include such waivers. *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 255-256 (2009) (internal quotation marks omitted).[8] That authority is limited by structural protections built into the statutory bargaining process, including the union's duty of fair representation and the employer's corresponding duty to bargain in good faith. *Id.* at 256.

Without addressing the substantive difference between individual and union waivers, the Employers (Murphy/Epic 45; E&Y 46) quote selectively from *Pyett*, where this Court stated "[n]othing in the law suggests a distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative." 556 U.S. at 258. That statement, in context, only made the point that to the extent an individual *may* waive a right, her bargaining representative may do so on her behalf. Nothing in *Pyett* suggests that individual employees can prospectively waive Section 157 rights as unions can. The law has long been to the contrary. See *NLRB* v. *Stone*, 125 F.2d 752, 756 (7th Cir. 1942) (rejecting analogy between individual agreements waiving Section 157 rights, and collectively bargained agreements waiving such rights).

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[8] A proviso in Section 159(a), which states that employees "shall have the right at any time to present grievances to their employer and to have such grievances adjusted," ensures that union-represented employees may present grievances directly to their employer, and employers may choose to entertain them without violating the NLRA. See *Emporium Capwell Co.* v. *W. Addition Cmty. Org.*, 420 U.S. 50, 61 n.12 (1975) (citation omitted); accord Pet. App. 72a-74a & nn.94-95. It does not, as amicus HR Policy Association (p. 19) suggests, "safeguard [an] individual employee's right to enter into arbitration agreements."

c. The Board's rule barring concerted-action waivers is also supported by the fact that Section 157 guarantees "public" rights aimed at "advanc[ing] the public interest in eliminating obstructions to interstate commerce" caused by labor disputes. *NLRB* v. *Fant Milling Co.*, 360 U.S. 301, 308 (1959); see also 29 U.S.C. 151. A public right, conferred on individual employees "but affecting the public interest," cannot be waived or released by an individual employee "if such waiver or release contravenes the statutory policy." *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 704 (1945); accord *New York* v. *Hill*, 528 U.S. 110, 116 (2000). By that standard, individual contractual waivers of Section 157 rights are plainly unenforceable. They directly violate Section 158's proscription on employer interference with such rights, and contravene the core policies Congress enacted the NLRA to promote.

3. The Acting Solicitor General argues that the Board's rule would "*expand*[] the range of circumstances in which [collective] litigation can go forward, by allowing employees who validly waived their collective-litigation rights under the FLSA to escape the consequences of that choice." OSG 14; *id.* at 19-21. That argument relies on the false premise that such a waiver by an NLRA-protected employee is valid when executed, and disregards the settled principle that conduct that is permissible under one statute may violate another.

The NLRA and the FLSA establish separate rights and protections, which coexist and apply simultaneously to all employees who qualify for protection under both statutes. Because the NLRA applies at the time an arbitration agreement is signed, it invalidates and prohibits any prospective waiver of protected concerted activity, including one barring concerted proceedings

under FLSA Section 216(b). As a result, any purported prospective waiver is unlawful from its inception, not only when an employer uses it to restrict protected concerted activity. There are thus no consequences to "escape" from, and the ability of NLRA-protected employees to engage in collective litigation is merely preserved, not "expanded." Indeed, the Board's finding that Murphy Oil violated Section 158 of the NLRA by *maintaining* an individual-arbitration agreement demonstrates that the bar on waivers of Section 157 rights protects employees at all times, so that they can never prospectively waive those rights.

Nor is the result of the Board's analysis "anomalous." OSG 21. Employees who are protected by the NLRA have rights that others do not. FLSA-covered employees without NLRA rights may lawfully be required to pursue their claims individually. But an FLSA-covered employee who has NLRA rights cannot be required prospectively to waive his right to join together with other employees to enforce their FLSA claims. That an employer may require NLRA-protected employees to forego concerted litigation procedures without violating the FLSA does not dictate, or even imply, that it may do so without violating the NLRA. As this Court explained in *Emporium Capwell Co.* v. *Western Addition Community Organization*, just because an employer's action is not prohibited by one statute "does not mean that [it] is immune from attack on other statutory grounds in an appropriate case." 420 U.S. 50, 72 (1975); see also *N.Y. Shipping Ass'n, Inc.* v. *Fed. Mar. Comm'n*, 854 F.2d 1338, 1367 (D.C. Cir. 1988) ("[T]here is no anomaly if conduct privileged under one statute is nonetheless condemned by another; we expect persons in a complex regulatory state to conform their behavior to the dictates of many laws, each serving its own special purpose.").

4. Finally, the Employers argue that precluding employees from joining together during arbitral or judicial proceedings adjudicating work-related claims does not meaningfully restrict Section 157 rights, because employees can engage in other types of concerted legal activity at the periphery of the adjudication. They suggest that employees can "work together at every step of the judicial or arbitral process," and cooperate in bringing individual arbitration cases. Murphy/Epic 40. Whether they can, as a practical matter, depends to some extent on the specific terms of the arbitration agreement.[9] More importantly, nothing in Section 158 suggests that employers may pick and choose among the concerted activities available to their employees.

To the contrary, the NLRA vests in employees, not employers, the decision whether to pursue legal claims individually or in concert with others. As this Court explained in *Washington Aluminum*, "the wisdom or unwisdom" of the employees' decision is not a legal justification for employer interference with the employees' rights. 370 U.S. at 16 n.12 (quotation omitted). Weighing the costs and benefits, employees may well opt for individual arbitration. But they may also opt to pursue their employment grievances concertedly in the belief that there is a strength in numbers not available to them in the individual-arbitration scheme that employers are willing to offer. Employees who

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[9] The ability to cooperate is inhibited, if not eliminated, by confidentiality clauses in many arbitration agreements. Ernst & Young's, for instance, provides that "[a]ll aspects of [the arbitration process], including any award made, shall be confidential, except to the extent disclosure is required by law or applicable professional standards, or is necessary in a later proceeding between the parties." E&Y Joint Appendix 46; Chamber 35 ("[O]ne of the hallmarks of employment arbitration is confidentiality.").

appear before tribunals that have authority to determine their legal rights may also find comfort and support from standing together as parties rather than appearing alone. The divide-and-conquer approach fostered by concerted-action waivers in arbitration agreements unlawfully deprives employees of that choice.

C. Contractual Restrictions of Section 157 Rights Violate Section 158(a)(1) and Are Unenforceable under the NLRA and General Contract Law

Congress conferred on the Board the power to "prevent any person from engaging in any unfair labor practice," 29 U.S.C. 160(a), and directed that the Board "shall issue * * * an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action * * * as will effectuate the policies of this subchapter," 29 U.S.C. 160(c).

That remedial requirement dovetails with the general contract principle that contracts violating federal law are properly denied enforcement in order to vindicate "public right[s]." *Nat'l Licorice*, 309 U.S. at 365-366 (citing cases arising under Sherman Act, Federal Trade Commission Act, and Railway Labor Act). The Court reaffirmed that principle in the context of the NLRA in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982). There, the Court explained that "a federal court has a duty to determine whether a contract violates federal law before enforcing it," *id.* at 83, and held that a contract requiring an employer to cease doing business with another company in violation of the NLRA could not be enforced, *id.* at 84-85. Because an individual-arbitration agreement interferes with employees' exercise of their Section 157 rights, and is therefore an unfair labor practice under Section

158(a)(1), it is unenforceable under both Section 160(c) and the general contract principle of illegality.

Having found that Murphy Oil violated the NLRA by maintaining an agreement requiring employees to arbitrate all work-related claims on an individual basis, the Board properly ordered that Murphy Oil cease and desist from maintaining that unlawful agreement. The Fifth Circuit erred in concluding that the FAA requires the enforcement of an agreement that the NLRA requires to be enjoined as an unfair labor practice. As we show in the following section, it should have held that an arbitration agreement that is illegal under the NLRA is exempt from enforcement under the FAA's saving clause. And it should have recognized that the FAA congressional-command cases, on which the Employers and their amici rely extensively, do not govern this case because they all assume a valid contract to arbitrate and address attacks on arbitration that are not at issue here.

II. THE FAA DOES NOT REQUIRE ENFORCEMENT OF ARBITRATION AGREEMENTS THAT VIOLATE THE NLRA

A. The FAA Places Arbitration Agreements on an "Equal Footing" with Other Contracts, Subject to General Contract Defenses

Section 2 of the FAA establishes that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. 2. That provision was enacted to counteract judicial hostility to arbitration and the historical practice of permitting parties to unilaterally revoke arbitration agreements. *Mitsubishi Motors Corp.* v. *Soler Chrysler-*

Plymouth, Inc., 473 U.S. 614, 625 n.14 (1985); see also H.R. Rep. No. 96, 1-2. Section 2 requires courts to "place arbitration agreements on an equal footing with other contracts, and enforce them according to their terms." *AT&T Mobility LLC* v. *Concepcion*, 563 U.S. 333, 339 (2011) (internal citation omitted); see also H.R. Rep. No. 96, 1 ("An arbitration agreement is placed upon the same footing as other contracts, where it belongs.").

Consistent with its purpose of recognizing arbitration agreements as legitimate contracts, Congress, in the FAA's saving clause, expressly required that an arbitration agreement satisfy general principles of contractual validity before it will be enforced. The saving clause thus allows a court to "invalidate an arbitration agreement based on 'generally applicable contract defenses' like fraud or unconscionability." *Kindred Nursing Ctrs. Ltd.* v. *Clark*, 137 S. Ct. 1421, 1426 (2017) (quoting *Concepcion*, 563 U.S. at 339). In keeping with that limitation, the Court has cautioned that "courts should remain attuned" to contract defenses. *Mitsubishi*, 473 U.S. at 627; see also *id.* at 632 ("A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate."); accord *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 33 (1991); *Shearson/Am. Express, Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987).

Conversely, defenses that "apply only to arbitration" do not prevent enforcement. *Kindred*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 339); see also *Southland Corp.* v. *Keating*, 465 U.S. 1, 16 n.11 (1984) (explaining contract defense that exists "merely * * * for the revocation of arbitration provisions" is not a ground "for the revocation of *any* contract" under FAA's saving clause). The same is true of defenses that, while ostensibly neutral, "derive their meaning

from the fact that an agreement to arbitrate is at issue." *Kindred*, 137 S. Ct. at 1426 (quoting *Concepcion*, 563 U.S. at 339). The FAA thus prohibits any rule that either facially discriminates against arbitration or "covertly accomplishes the same objective by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements." *Ibid.*

B. Arbitration Agreements Containing Concerted-Action Waivers Violate the NLRA and Are Therefore Unenforceable Pursuant to the FAA's Saving Clause

1. The Board's rule fits within the saving clause because it is neutral with respect to arbitration

The Board's rule—that arbitration agreements containing concerted-action waivers are illegal—fits within the saving clause as an application of both the general principle that a contract is illegal if it violates federal law and the NLRA principle that an individual contract cannot prospectively waive Section 157 rights. As shown, since shortly after the NLRA's enactment, the Board has consistently rejected such waivers in a variety of settings, all unrelated to arbitration. See *supra* pp. 23-25 (discussing *Nat'l Licorice* and Board caselaw).

In the context of concerted *legal* activity, the Board has invalidated agreements prohibiting employees from filing any future lawsuit, Board charge, or other legal action. See *McKesson Drug Co.*, 337 N.L.R.B. 935, 938 (2002). And, further demonstrating that the prohibition of individual prospective waivers is neutral with respect to arbitration, the Board has found such waivers of concerted-litigation procedures

unlawful even when unconnected to an agreement to arbitrate. See *Logisticare Solutions, Inc.*, 363 N.L.R.B. No. 85, 2015 WL 9460027, at *1 (Dec. 24, 2015), petition for review filed, 5th Cir. No. 16-60029 (oral argument held Sept. 28, 2016); *Convergys Corp.*, 363 N.L.R.B. No. 51, 2015 WL 7750753, at *1 & n.3 (Nov. 30, 2015), enforcement denied, No. 15-60860, 2017 WL 3381432 (5th Cir. Aug. 7, 2017) (Higginson, J., concurring in judgment only; Higginbotham, J. dissenting). Barring concerted-action waivers contained in arbitration agreements thus accords with the FAA's equal-footing principle of "mak[ing] arbitration agreements as enforceable as other contracts, but not more so." *Prima Paint Corp.* v. *Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967).

The specifics of the Board's rule also demonstrate that it does not evince the hostility to arbitration that prompted Congress to enact the FAA. It is not based on any view that statutory rights cannot be effectively vindicated in individual arbitration. See *Horton*, 357 N.L.R.B. at 2285. Accordingly, the Board made clear that an employer may require arbitration of all *individual* work-related claims. *Id.* at 2288. Likewise, the Board has recognized that "arbitration must be treated as the equivalent of a judicial forum," so an employer may bar an employee from pursuing concerted legal claims in court if it permits employees to pursue them in arbitration. *SolarCity Corp.*, 363 N.L.R.B. No. 83, 2015 WL 9315535, at *5 n.15 (Dec. 22, 2015) (citing *Gilmer*, 500 U.S. 20), petition for review filed, 5th Cir. No. 16-60001.[10] The sole object

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[10] The Employers disregard *SolarCity* in arguing that the Board's rule would mean that "mandatory arbitration in the employment context would be a thing of the past" because "[e]very employment agreement would have to leave open a

of the Board's rule is to prevent interference with the right of employees to act in concert in some forum when they have a dispute with their employer. The rule is entirely neutral with respect to whether employees can collectively pursue their statutory claims in an arbitral or judicial forum.

Because the Board's rule does not target or affect only arbitration agreements, or "derive [its] meaning from the fact that an agreement to arbitrate is at issue," *Concepcion*, 563 U.S. at 339, it "meets the criteria of the FAA's saving clause for nonenforcement," *Lewis* v. *Epic Sys. Corp.*, 823 F.3d 1147, 1157 (7th Cir. 2016); accord *NLRB* v. *Alt. Entm't, Inc.*, 858 F.3d 393, 403 (6th Cir. 2017); *Morris* v. *Ernst & Young, LLP*, 834 F.3d 975, 986 (9th Cir. 2016).

2. *Concepcion* does not dictate rejection of the Board's rule

Contrary to the arguments of the Employers (Murphy/Epic 24-27) and amici (*e.g.*, OSG 32-33), and the conclusion of the Fifth Circuit in *Horton*, 737 F.3d at 358-360, the Court's saving-clause analysis in *Concepcion*, 563 U.S. at 341-351, is not dispositive here.[11] The Concepcions filed suit against AT&T, alleging false advertising and fraud in connection with the sale of cellular telephones, and AT&T moved to compel

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judicial forum for class and collective claims." Murphy/Epic 47-48 (internal quotation marks omitted).

[11] The Fifth Circuit is the only court of appeals to have considered and rejected the Board's saving-clause rationale, though it did so without acknowledging *National Licorice*. Neither the Second nor Eighth Circuits considered the applicability of the saving clause in rejecting the Board's rule. See *Sutherland* v. *Ernst & Young LLP*, 726 F.3d 290, 297 n.8 (2d Cir. 2013); *Owen* v. *Bristol Care, Inc.*, 702 F.3d 1050, 1053-1055 (8th Cir. 2013).

arbitration based on a clause in its sales agreement requiring individual arbitration. 563 U.S. at 337. The Ninth Circuit affirmed the district court's denial of the motion, relying on the California Supreme Court's *Discover Bank* rule. *Concepcion*, 563 U.S. at 337-338 (citing *Discover Bank* v. *Superior Court*, 113 P.3d 1100 (Cal. 2005)). That rule interpreted state unconscionability principles as prohibiting class-action waivers in adhesive consumer-arbitration agreements, and permitted a party to such an agreement to unilaterally demand class arbitration in certain situations. *Id.* at 340, 346. This Court reversed, rejecting the argument that the *Discover Bank* rule fit within the FAA's saving clause. *Id.* at 341-352. There are several critical distinctions between that rule and the Board's.

First, the Court in *Concepcion* found the *Discover Bank* rule preempted by the FAA. *Id.* at 352. The Court explained that the saving clause does not "preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's objectives" and that, more generally, "a federal statute's saving clause cannot in reason be construed as [allowing] a common law right, the continued existence of which would be absolutely inconsistent with the provisions of the act." *Id.* at 343 (internal quotation marks omitted). By contrast, it is a different matter to find that the FAA's saving clause preserves another *congressional* purpose: the protection of employees' Section 157 rights from employer interference. See *Alt. Entm't*, 858 F.3d at 406 (noting that whereas *Discover Bank* rule "thwarted the congressional intent embodied by the FAA," the Board's rule "involves the interaction of two federal statutes, both of which embody the 'purposes and objectives of Congress'") (quoting *Concepcion*, 563 U.S. at 352). As this Court has made clear, "courts are not at liberty to pick and choose among congressional

enactments" but must, when possible, "regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). Here, Congress provided, in the text of the FAA, a clear path to effectuating both statutes: the saving clause precludes enforcement where, as here, an arbitration agreement is not a valid contract because it directly violates a prohibition in a coequal federal statute.

Citing *American Express Co.* v. *Italian Colors Restaurant*, 133 S. Ct. 2304, 2312 n.5 (2013), the Employers suggest (Murphy/Epic 25-26) that the federal provenance of the Board's rule is immaterial. But that was not what *Italian Colors* held. There, the Second Circuit had refused to compel arbitration after determining that the agreement's class waiver would effectively prevent the plaintiff from vindicating its antitrust claims because proceeding individually would be too expensive. *Italian Colors*, 133 S. Ct. at 2308. This Court rejected that rationale as directly analogous to the *Discover Bank* rule. *Id.* at 2312. In countering the suggestion that *Concepcion* had no relevance to a *federal* challenge to arbitration, the Court cited *Concepcion*'s holding that the FAA's enforcement requirement is not overcome by an interest in facilitating prosecution of low-value claims. *Id.* at 2312 n.5 (citing *Concepcion*, 563 U.S. at 350-351). That finding was determinative because, as *Italian Colors* emphasized, the antitrust statutes creating the plaintiff's causes of action also did "not guarantee an affordable procedural path to the vindication of every claim." *Id.* at 2309.

In other words, *Italian Colors* did not hold that the federal provenance of the lower court's rule was immaterial, but that the Second Circuit's rule was based on a judicial policy similar to the one that the Court had

recently rejected in *Concepcion*. The two cases are thus distinguishable for the same reason: both are based only on a judicial policy intended to facilitate certain types of claims; neither involved a federal *statutory* imperative to consider alongside the FAA's enforcement mandate. The Board's rule, by contrast, is based on a coequal federal statute that makes it unlawful for employers to require individual employees to waive the rights guaranteed them in Section 157.

Second, *Concepcion* is distinguishable in terms of the *Discover Bank* rule's impact on the arbitration process. In rejecting the *Discover Bank* rule, *Concepcion* emphasized that "[r]equiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." 563 U.S. at 344. Contrary to the representations of the Employers (Murphy/Epic 25), the Board's rule does not similarly permit one party to force class or collective arbitration. In fact, an employer may insist that any arbitral proceedings be conducted on an individual basis, provided it leaves open a judicial forum for collective action. *Horton*, 357 N.L.R.B. at 2288. Unlike the *Discover Bank* rule, the Board's rule thus respects the FAA's emphasis on the voluntary nature of arbitration and preserves individual arbitration consistent with the FAA. See *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 681-687 (2010).

Nor is the Fifth Circuit correct that the Board's rule is nonetheless unenforceable pursuant to *Concepcion* because it "is an actual impediment to arbitration and violates the FAA." *Horton*, 737 F.3d at 360 (citing *Concepcion*, 563 U.S. at 344). That analysis fails to

recognize that the NLRA outlaws agreements requiring individual arbitration of work-related claims and calls for them to be enjoined. Even if enforcing employees' NLRA rights impedes some arbitration that might otherwise take place, that is a direct consequence of employers' maintenance of illegal contracts that, under the FAA's equal-footing principle, are exempted from enforcement. As the Court has recognized, the consequences of limiting language in the FAA are not grounds for disregarding those limits. Cf. *Hall St. Assocs., LLC* v. *Mattel, Inc.*, 552 U.S. 576, 588-589 (2008) (after finding FAA sets exclusive grounds for review of arbitration awards, Court rejected competing claims that permitting expansion of contractual grounds for review would either discourage or encourage arbitration: "whatever the consequences of our holding, the statutory text gives us no business to expand the statutory grounds").

Finally, while the Employers and their amici seek to make this case a referendum on class actions—a matter more properly considered when revising the Federal Rules of Civil Procedure—the agreements at issue are not limited to class actions but bar any concerted litigation of employees' statutory employment claims. The concerns regarding class arbitration detailed in *Concepcion*, 563 U.S. at 347-351, and in the briefs of the Employers (Murphy/Epic 25) and their amici (*e.g.*, OSG 32-33), apply to only a few of the available concerted legal procedures. In the name of promoting arbitration and avoiding representative lawsuits, the Employers effectively ask this Court to prohibit employees from exercising their protected right to band together in pursuing their work-related legal claims. Doing so would eliminate the employees' right to invoke less complex procedures that do not entail similar procedural burdens or create the same

types of litigation incentives as representative actions.[12] That would elevate a policy preference over a statutory mandate.

3. The Employers' remaining saving-clause arguments violate the FAA's equal-footing principle

The Employers assert three purported limitations to the saving clause that would exclude the Board's rule. Each contravenes the FAA's equal-footing principle.

First, the Employers insist categorically that federal saving clauses "do not save 'other federal statutes enacted by the same sovereign.'" Murphy/Epic 20 (quoting *Alt. Entm't*, 858 F.3d at 418 (Sutton, J., dissenting in part)); E&Y 33-34. That sweeping assertion is unsupported. The plain language of Section 2 is unqualified; it encompasses all defenses that would nullify "any" contract without reference to their source. 9 U.S.C. 2; see *TC Heartland LLC* v. *Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1521 (2017) (saving clause in federal court venue statute "saved" federal patent-venue provision). And there is no reason to think that Congress assumes that unqualified saving clauses preserve only state (or only federal) laws. Rather, Congress has expressly preserved both state and federal laws, to differing extents, in various statutes, indicating that it knows how to limit the reach

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[12] Some amici (*e.g.*, Council on Labor Law Equality 33-34) assert that single plaintiffs and their counsel, some acting outside the bounds of ethical professional conduct, file putative collective actions to bring about "in terrorem" settlements. If so, the solution lies not in adopting an overinclusive rule that undermines the NLRA's protection of concerted activity, but rather in utilizing available attorney disciplinary measures or seeking reforms to those collective-litigation procedures that are susceptible to misuse.

of a saving clause when that is its intent. For instance, in the Copyright Act of 1976, Congress saved specific state laws expressly, 17 U.S.C. 301(b), in addition to "any other Federal statute," *id.* at 301(d). See also, *e.g.*, Employee Retirement Income Security Act, 29 U.S.C. 1001, 1144(a), (b), (d) (saving some state law and all federal statutes). Nor does *Perry* v. *Thomas*, 482 U.S. 483 (1987), support the Employers' claim (Murphy/Epic 20; E&Y 33-34). *Perry* couched its saving-clause discussion in terms of state law because the defenses asserted there were grounded in state law. 482 U.S. at 492 n.9.

Second, the Employers (Murphy/Epic 20-23) insist that the FAA's saving clause only preserves contract defenses "that may be invoked with respect to *any* contract, regardless of its subject matter," whereas the Board's rule applies only to contracts with NLRA-protected employees. Their argument ignores that the Board's rule is an application of the generally applicable contract defense of illegality. It also disregards this Court's holdings interpreting the "any contract" language in the saving clause as excluding only defenses that "have been applied in a fashion that disfavors arbitration" or "rely on the uniqueness of an agreement to arbitrate." *Concepcion*, 563 U.S. at 341; see also, *e.g.*, *Doctor's Assocs., Inc.* v. *Casarotto*, 517 U.S. 681, 683 (1996) (distinguishing between defenses governing "any contract" and those applying "specifically and solely [to] contracts subject to arbitration" (internal quotation marks omitted)).

Third, the saving clause is not limited, as the Employers assert, to grounds that "relat[e] to 'the making of the agreement.'" Murphy/Epic 27 (quoting 9 U.S.C. 4). Notwithstanding Justice Thomas' concurrence in *Concepcion*, 563 U.S. at 352-357, the majority

concluded that the "saving clause permits agreements to arbitrate to be invalidated by 'generally applicable contract defenses, such as fraud, duress, or unconscionability.'" *Id.* at 339 (quoting *Doctor's Assocs.*, 517 U.S. at 687). Unconscionability, which was the defense at issue in *Concepcion*, is not exclusively related to the "making" of the arbitration agreement. Nor is it necessarily a ground to "revoke" rather than "invalidate" a contract. See 8 Richard A. Lord, Williston on Contracts § 18:1 (4th ed. 2014); cf. *Concepcion*, 563 U.S. at 354 (Thomas, J. concurring) (conceding that "the difference between revocability, on the one hand, and validity and enforceability, on the other, is not obvious" based on the statute, the "ordinary meanings" of the words, or this Court's usage).

Each of the limitations the Employers propose would result in the enforcement of agreements to arbitrate that are illegal under general contract principles for reasons unrelated to arbitration. That result would vitiate the FAA's equal-footing principle.

C. None of the Court's FAA Cases Require Rejection of the Board's Rule

The Employers and their amici urge the Court to reject the Board's rule on the ground that the Court has already decided the issues presented here. Their briefs exhaustively review the Court's FAA jurisprudence and distill from it two related propositions: (1) an agreement to arbitrate federal statutory claims must be enforced as written unless the party opposing arbitration demonstrates a specific congressional command precluding arbitration of those claims; and (2) the FAA mandates enforcement of provisions in arbitration agreements requiring that all claims proceed on an individual basis. Neither proposition is

correct. The Court's cases addressed different concerns than those underlying the Board's rule and did not decide the distinct issue presented here.

1. The congressional-command test is not the sole exception to enforcement in cases involving another federal statute

The Employers (Murphy/Epic 9, 14-18; E&Y 5, 21-25) and many amici (*e.g.*, OSG 15-18, 31; HR Policy Ass'n 21-23) argue that the outcome of this case is determined by applying the congressional-command test developed in a line of FAA cases. They are wrong. Although most of the Court's cases involving the FAA and another federal statute have applied that test, those cases are distinguishable in two key respects.

First, none of those congressional-command cases involved an agreement that was illegal because it violated a federal statute, as the Employers' agreements violate the NLRA. Rather, the contractual validity of the agreements at issue in those cases was assumed, unchallenged, or affirmed *before* the impact of the FAA was addressed. That mode of analysis is evident from the Court's earliest congressional-command cases. *Mitsubishi* and *McMahon* both explicitly acknowledged that a valid agreement is a threshold requirement for enforcement under Section 2 of the FAA, which incorporates general contract defenses through the saving clause. See *Mitsubishi*, 473 U.S. at 627; see also *id.* at 632 ("A party resisting arbitration of course may attack directly the validity of the agreement to arbitrate."); *McMahon*, 482 U.S. at 226. In other words, the congressional-command cases cited by the Employers and their amici do not support their claim that this case can be resolved without first considering the validity of the arbitration agreement

under Section 2. The congressional-command test presupposes the existence of an enforceable contract to arbitrate.

Second, the congressional-command test developed in response to objections to arbitration that the Board does not share. Most congressional-command cases involved claims that the statutory rights at issue could only be enforced in judicial proceedings or that the arbitral forum was inadequate.[13] In rejecting those arguments, the Court made clear that an arbitral forum is to be treated as equivalent to a judicial forum—that "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi*, 473 U.S. at 628); see also *CompuCredit Corp.* v. *Greenwood*, 565 U.S. 95, 101 (2012) (Court has "repeatedly recognized that contractually required arbitration of claims satisfies the statutory prescription of civil liability in court") (citing *Gilmer*, *McMahon*, and *Mitsubishi*). The party objecting to arbitration under such circumstances, the Court repeatedly held, bears the burden of demonstrating that Congress intended for the rights at issue to be adjudicated only in court.

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[13] See, *e.g.*, *Gilmer*, 500 U.S. at 29 (finding judicial-forum provision in ADEA did not evince congressional intent to "explicitly preclude arbitration or other nonjudicial resolution of claims"); *id.* at 30 (rejecting "a host of challenges to the adequacy of arbitration procedures"); *McMahon*, 482 U.S. at 231-234 (rejecting various arguments that arbitral tribunals were not adequate or capable of handling complex claims); *Mitsubishi*, 473 U.S. at 626-627 (rejecting challenges to arbitration perceived as embodying "suspicion of the desirability of arbitration and of the competence of arbitral tribunals").

Casting that burden upon the Board makes no sense because the Board is not asserting that FLSA or other claims must be adjudicated in court or that they cannot be adequately vindicated in arbitration. See *supra* pp. 37-39. The Board's complaint is that requiring employees to resolve their legal disputes with their employer solely on an individual basis deprives them of their core NLRA right to jointly pursue their work-related legal claims. See *supra* pp. 22-26. That NLRA right is not focused only on vindication of particular individual claims. It extends to employees who join in supporting others, regardless of whether doing so advances their own interests. See, *e.g.*, *United Servs. Auto. Ass'n*, 340 N.L.R.B. 784, 792 (2003) (employee opposed employer policy "solely for the benefit of her fellow employees" when she would not personally be affected), enforced, 387 F.3d 908 (D.C. Cir. 2004); *Caval Tool Div.*, 331 N.L.R.B. 858, 862 (2000) ("[A]n employee who espouses the cause of another employee is engaged in concerted activity, protected by Section [157] of the [NLRA]."), enforced, 262 F.3d 184 (2d Cir. 2001).

CompuCredit, a case cited extensively by the Employers and their amici, does not require use of the congressional-command test in this case. Initially, as in the cases described above, *supra* p. 48 & n.13, the main argument against arbitration in *CompuCredit*, unlike the Board's contention here, was that the statutory rights could only be enforced in a judicial forum. Moreover, it is inconsequential that, as the Employers (Murphy/Epic 16-17; E&Y 21) note, the decision does not reference the saving clause when it states that the FAA requires enforcement of agreements "even when the claims at issue are federal

statutory claims, unless the FAA's mandate has been 'overridden by a contrary congressional command.'" *Id.* at 98 (quoting *McMahon*, 482 U.S. at 226; and citing *Mitsubishi*, 473 U.S. at 628). The Court's analysis presupposed the existence of a valid agreement, as evidenced by its citation to *McMahon* and *Mitsubishi*, both of which reference the validity requirement.[14]

If anything, *CompuCredit* supports the Board's position that the threshold question of whether agreements with concerted-action waivers violate the NLRA (and are thus unenforceable pursuant to the saving clause) should first be analyzed without reference to the policies of the FAA. In *CompuCredit*, the Court rejected an agreement's asserted violation of a federal statute based on an analysis of that statute independent of the FAA. 565 U.S. at 99-100 (provision requiring disclosure statement referencing "right to sue" did not create right to judicial forum protected by non-waiver provision). And the Court took a similar approach in *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, explaining that before deciding whether the FAA or another federal statute had "priority," it

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[14] In *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, which the Employers also cite (Murphy/Epic 15, 23 n.2), the Court rejected an argument that an arbitration agreement violated a prohibition in a federal statute, and therefore had no occasion to reference the saving clause. 515 U.S. 528, 533-539 (1995). In dissent, Justice Stevens would have found a federal statutory violation, *id.* at 543-554, and concluded that, because of the FAA's saving clause, "[n]either the terms nor the policies of the FAA would be thwarted" by finding the agreement unenforceable, *id.* at 555-556.

must determine whether it could "regard each as effective." 515 U.S. 528, 533 (1995) (quoting *Morton*, 417 U.S. at 551) (additional citation omitted).

Finally, there is a serious conceptual flaw in the Employers' argument that a federal statute can bar enforcement of an arbitration agreement *exclusively* via congressional command. That would require enforcement of arbitration agreements that violate individuals' rights under any federal statute that does not have a contrary congressional command, allowing contractual nullification of those rights. For instance, because it has been established that the ADEA does not contain a congressional command precluding arbitration of age-discrimination claims, see *Gilmer*, 500 U.S. at 27-29, an arbitration agreement requiring only persons over 40 to resolve their statutory claims in arbitration would be enforceable under the Employers' theory. Application of the saving clause, the exception written into the enforcement provision of the FAA, avoids that untenable result.

2. The Court has never considered the validity of an arbitration agreement with a concerted-action waiver that violates a federal statute

The Employers (Murphy/Epic 8, 42-43) and their amici (*e.g.*, OSG 30; HR Policy Ass'n 23) cite *Gilmer*, *Concepcion*, and *Italian Colors* to support their insistence that the FAA unambiguously mandates enforcement of concerted-action waivers in arbitration agreements. But none of those cases presented an arbitration agreement that was enjoinable under another federal statute.

Gilmer does not resolve this case because the ADEA's collective-action procedure is not protected by

a prohibition comparable to Section 158. As shown, Section 158 implements Section 157's protection of concerted pursuit of claims by barring any employer interference with Section 157 rights, including through individual contracts prospectively waiving protected rights. By contrast, as the Court explained in *Gilmer*, the ADEA's collective-action procedure, 29 U.S.C. 626(b), which is identical to FLSA Section 216(b), simply presents an optional method for enforcing the statute's prohibition on age discrimination. See *Gilmer*, 500 U.S. at 32. The availability of that procedure would not prevent enforcement of an agreement that required individual proceedings. *Id.* at 29; see *Carter* v. *Countrywide Credit Indus., Inc.*, 362 F.3d 294, 298 (5th Cir. 2004) (applying *Gilmer* to validate arbitration agreement with class waiver in FLSA case).[15] Likewise, as discussed, *supra* pp. 41-42, the challenges to individual proceedings in *Concepcion* and *Italian Colors* were not anchored in statutory provisions akin to Section 158 but hinged on arguments that concerted-action waivers would operate to prevent plaintiffs from vindicating low-value claims.

Not only are the cases relied on by the Employers and their amici distinguishable, but the analysis employed in *Gilmer* and some other FAA cases supports the Board's conclusions. As stated in *Vimar*, this

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[15] It is unclear whether Gilmer, a Manager of Financial Services, 500 U.S. at 23, was protected by the NLRA, see 29 U.S.C. 152(3) (excluding "supervisors" from definition of statutory employee); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 289 (1974) (excluding "managerial employees"). In any event, Gilmer did not seek to pursue his claims in concert with other employees, and was bound by an agreement that provided for collective proceedings. *Gilmer*, 500 U.S. at 23-24, 32.

Court has been careful to distinguish between a statute's "explicit statutory guarantees and the procedure for enforcing them" when determining which statutory rights or provisions may be constrained by contract. 515 U.S. at 534. For example, in assessing Gilmer's challenges to arbitration of his ADEA claims, the Court began by identifying the core congressional purpose of the statute. *Gilmer*, 500 U.S. at 27. The Court found that the ADEA was intended to promote employment of older persons, and that it effectuates that goal by prohibiting age-based employment discrimination; it did not identify ensuring the availability of collective proceedings as a core ADEA purpose. *Ibid.*; see also, *e.g.*, *Rodriguez de Quijas* v. *Shearson/Am. Express, Inc.*, 490 U.S. 477, 481 (1989) (holding judicial-forum and venue provisions in the Securities Act were not "essential features" of the statute). Therefore, the Court did not sanction restricting the ADEA's central guarantee when it stated that an arbitration agreement could waive the ADEA's collective-action procedure.

Applying the distinction between a statute's explicit guarantees and its enforcement procedures confirms that the Board's rule barring waiver of concerted legal procedures is sound. Section 157 of the NLRA is "the *core* substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest." Pet. App. 40a (quoting *Horton*, 357 N.L.R.B. at 2286); see also *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937) (characterizing rights protected by Section 157 as "fundamental"). An arbitration agreement requiring employees to resolve legal disputes solely on an individual basis is thus comparable to an unlawful contract providing that employees can be fired on the basis of age, contrary to the ADEA, 29 U.S.C. 623, or paid less than the minimum wage, contrary to the FLSA, 29 U.S.C. 206.

The preceding analysis (Part II) of this Court's FAA jurisprudence demonstrates that the proper framework for assessing the Board's rule is the FAA's textual exception to enforcement, the saving clause. A contract that violates the NLRA is illegal and enjoinable. Therefore, it fits within the saving clause and the FAA does not require its enforcement. Moreover, in the absence of a valid enforceable contract to arbitrate, the congressional-command test is inapplicable. Consequently, the Board's rule effectuates both federal labor policy and federal arbitration policy.

D. A Private Contract Cannot Nullify a Federal Statute

Even absent the saving clause, nothing in the FAA can sanction the enforcement of arbitration agreements that serve to eviscerate a federal statute, particularly one that creates public rights. See *Brooklyn Sav. Bank* v. *O'Neil*, 324 U.S. 697, 704-705 (1945). In *National Licorice*, the Court barred contractual nullification of the NLRA specifically, 309 U.S. at 360-364, emphasizing that "[t]he Board asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices," *id.* at 364. More generally, the Court has made clear that where enforcement of private contracts would violate federal statutes, courts are obliged not to enforce them. *Kaiser*, 455 U.S. at 83-84.

The Court has also emphasized, in the FAA context specifically, that it will not countenance waiver of substantive federal rights like those guaranteed in Section 157. The Court liberally enforces arbitration agreements in part based on its confidence that resolution of claims in an arbitral forum, in lieu of a judicial forum, does not entail the waiver of parties' "*right to pursue* statutory remedies," *Italian Colors*,

133 S. Ct. at 2310 (quoting *Mitsubishi*, 473 U.S. at 637 n.19 (emphasis added)), including by "forbidding the assertion of certain statutory rights," *ibid.* See also *Gilmer*, 500 U.S. at 26 ("[B]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute.") (quoting *Mitsubishi*, 473 U.S. at 628). Contrary to that oft-repeated premise, enforcement of agreements requiring *individual* resolution of all work-related claims will, by definition, preclude employees from asserting and pursuing their core Section 157 right to engage in concerted activity for mutual protection.

Here, the Board specifically found that Murphy Oil's agreement (which is materially identical to Epic's and Ernst & Young's agreements) would violate the NLRA in precisely that manner, and thus issued a cease-and-desist order barring enforcement of the agreement pursuant to its remedial powers, 29 U.S.C. 160(c). If a court were to enforce such an agreement, it would become a party to that violation.

Finally, nothing in the FAA so much as suggests that Congress intended, in affirming the legitimacy of arbitration agreements as legally binding contracts, to authorize private parties' use of such agreements to evade their federal statutory obligations. Accordingly, even if the Court determines that the FAA and the NLRA cannot both be fully effectuated by recognizing that the Board's rule fits within the saving clause, the Board's Order is entitled to enforcement.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

STATUTORY APPENDIX

Section 151 of the National Labor Relations Act (NLRA), 29 U.S.C. 151: Findings and policies

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by

removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

Section 157 of the NLRA, 29 U.S.C. 157: Rights of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 158 of the NLRA, 29 U.S.C. 158: Unfair labor practices

(a) Unfair labor practices by employer

It shall be an unfair labor practice for an employer–

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

Section 159 of the NLRA, 29 U.S.C. 159: Representatives and elections

(a) Exclusive representatives; employees' adjustment of grievances directly with employer

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative

has been given opportunity to be present at such adjustment.

Section 160 of the NLRA, 29 U.S.C. 160: Prevention of unfair labor practices

(a) Powers of Board generally

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(c) Reduction of testimony to writing; findings and orders of Board

The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to

be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter: *Provided,* That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further,* That in determining whether a complaint shall issue alleging a violation of subsection (a)(1) or (a)(2) of section 158 of this title, and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an administrative law judge or judges thereof, such member, or such judge or judges as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service

thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

Section 2 of the Federal Arbitration Act, 9 U.S.C. 2: Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 206 of the Fair Labor Standards Act (FLSA), 29 U.S.C. 206: Minimum wage

(a) Employees engaged in commerce; home workers in Puerto Rico and Virgin Islands; employees in American Samoa; seamen on American vessels; agricultural employees

Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates * * *.

Section 207 of the FLSA, 29 U.S.C. 207: Maximum hours

(a) Employees engaged in interstate commerce; additional applicability to employees pursuant to subsequent amendatory provisions

(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 216 of the FLSA, 29 U.S.C. 216: Penalties

(b) Damages; right of action; attorney's fees and costs; termination of right of action

Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a

public agency) in any Federal or State court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be, owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

Section 623 of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623: Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

Section 626 of the ADEA, 29 U.S.C. 626: Recordkeeping, investigation, and enforcement

(b) Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided,* That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting

any action under this section, the Equal Employment Opportunity Commission shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.